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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1545

EARL L. BUTZ, SECRETARY OF AGRICULTURE, AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

GLOVER LIVESTOCK COMMISSION COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 454 F. 2d 109. The decision and order of the Judicial Officer of the Department of Agriculture (Pet. App. B) is reported at 30 A.D. 179.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on January 26, 1972. On April 18, 1972, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including May

25, 1972. The petition for a writ of certiorari was filed on May 25, 1972 and was granted on October 24, 1972. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals exceeded its authority as a reviewing court by setting aside the 20-day suspension of a registrant under the Packers and Stockyards Act ordered by the Secretary for a wilful violation of the Act.

STATUTES INVOLVED

The relevant provisions of the Packers and Stockyards Act of 1921, 7 U.S.C. 181 *et seq.*, and of the Judicial Code (28 U.S.C.) are set forth in the Appendix, *infra*, pp. 24–26.

STATEMENT

Respondent, Glover Livestock Commission Co., Inc., operates a stockyard in Pine Bluff, Arkansas, and is registered under Section 303 of the Packers and Stockyards Act, 7 U.S.C. 203, as a "market agency." As a registrant, respondent may sell consigned livestock on a commission basis but must comply with certain requirements set forth in the Act (7 U.S.C. 201–217a) and in implementing regulations of the Department of Agriculture (9 C.F.R. Part 201).[1] In particular, respondent was required "to establish, observe, and enforce just, reasonable, and nondiscrimina-

[1] The statute and regulations governing the operation of market agencies are designed to protect the interests of the consignors and purchasers of livestock, who must rely upon the market agency in the handling of their transactions, and

tory regulations and practices" (7 U.S.C. 208(a)), and to "keep such accounts, records, and memoranda as fully and correctly disclose all transactions" (7 U.S.C. 221), and was prohibited from engaging in or using "any unfair, unjustly discriminatory, or deceptive practice or device in connection with * * * the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling * * * of livestock" (7 U.S.C. 213(a)).

On three occasions prior to the present controversy (*i.e.*, on June 2, 1964, July 26, 1966 and June 20, 1967) the Department of Agriculture had found that respondent had underweighed livestock which it had sold on consignment (Pet. App. A, 16). Respondent had been notified of those findings and requested to institute corrective action to insure accurate weighing at the stockyard (Pet. App. A, 16–17).

On February 25, 1969, an investigation revealed that respondent had again underweighed certain cattle, and as a result of that investigation the present proceeding was instituted (Pet. App. A, 17). After a hearing

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the public interest in general. See, *e.g.*, *Midwest Farmers* v. *United States*, 64 F. Supp. 91, 95 (D. Minn). To that end, the statute and regulations prescribe, *inter alia*, practices with regard to weighing, record keeping, and the conduct of sales, in order to insure fair and honest treatment to both buyers and sellers. See, *e.g.*, 7 U.S.C. 203, 204, 207, 208; 9 C.F.R. 201.10, 201.29, 201.39–201.85. As this Court has recognized, this comprehensive regulatory statute thus "treats the various stockyards as great national public ntilities * * *." *Stafford* v. *Wallace*, 258 U.S. 495, 516. See also *Denver Union Stockyard Co.* v. *Producers Livestock Marketing Association*, 356 U.S. 282, 286, 289.

and the submission of briefs, the Department of Agriculture hearing examiner found that "[o]n February 25, 1969, * * * in selling consigned livestock on a weight basis, respondent intentionally weighed the livestock at less than their true weights, issued scale tickets and accountings to the consignors on the basis of the false weights, and paid the consignors on the basis of the false weights" (App. 35). For these violations of respondent's statutory duties, the hearing examiner proposed, in addition to cease-and-desist orders and an order to keep correct accounts, a 30-day suspension of respondent's registration (App. 37).

The matter was then referred to a Judicial Officer having authority to act on behalf of the Secretary. After the filing of exceptions and oral argument, the Judicial Officer reviewed the evidence and ruled (Pet. App. B, 33–34):

> We conclude then, as did the hearing examiner, that respondent wilfully violated sections 307 and 312(a) of the act (7 U.S.C. 208 and 213(a)) by the incorrect weighings. Weighing livestock at less than its true and correct weight has long been held to be a violation of those sections of the act. See, *e.g., In re Ray C. Townsend, d/b/a Madison Stockyards,* 27 A.D. 68 (1968) and the cases cited therein.
>
> Of course the entries by respondent of the false weights upon scale tickets and accounts of sale, copies of which are part of respondent's records constituted a breach of section 401 of the act (7 U.S.C. 221).

> It is not a pleasant task to impose sanctions but in view of the previous warnings given respondent we conclude that we should not only issue a cease and desist order but also a suspension of respondent as a registrant under the act but for a lesser period than recommended by [the Packers and Stockyards Administration] and the hearing examiner.

Respondent's registration was suspended for 20 days (Pet. App. B).[2] Since respondent operates only on Tuesdays, the suspension would interrupt its business for at most three business days (App. 13–14).

After an extensive review of the testimony and other evidence, the court of appeals upheld, as supported by substantial evidence, "the Judicial Officer's findings that [respondent] violated the Act by short-weighing cattle" (Pet. App. A, 21), and sustained the Secretary's cease-and-desist order (Pet. App. A, 22). However, the court set aside the 20-day suspension order (Pet. App. A, 25).

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[2] The Secretary's order also directed respondent to cease and desist from:

(1) Weighing livestock at other than their true and correct weights;

(2) Issuing scale tickets or accountings on the basis of false and incorrect weights;

(3) Paying the consignors of livestock on the basis of weights other than the true and correct weights; and

(4) Failing to operate livestock scales owned or controlled by respondent in accordance with the regulations under the Act.

The order further directed respondent to maintain records reflecting the true weights of livestock sold by it on a weight basis (Pet. App. B, 34).

The court ruled that the order was within the Secretary's authority under 7 U.S.C. 204, which provides that "whenever * * * the Secretary finds any registrant * * * has violated any provisions of this chapter he may issue an order suspending such registrant for a reasonable specified period." The court also held that the order complied with the pertinent requirements of the Administrative Procedure Act, 5 U.S.C. 558, since respondent had been given notice of prior violations and an opportunity to achieve compliance with the statutory requirements. The court further noted (Pet. App. A, 24):

> Ordinarily it is not for the courts to modify ancillary features of agency orders which are supported by substantial evidence. The shaping of remedies is peculiarly within the special competence of the regulatory agency vested by Congress with authority to deal with these matters, and so long as the remedy selected does not exceed the agency's statutory power to impose and it bears a reasonable relation to the practice sought to be eliminated, a reviewing court may not interfere. * * * [A]ppellate courts [may not] enter the more spacious domain of public policy which Congress has entrusted in the various regulatory agencies. * * *

Nevertheless, the court reversed the suspension order as "unconscionable" (Pet. App. A, 25). The court, apparently relying on its conclusion that respondent had not acted deliberately or flagrantly but only with careless disregard of the statutory requirements, held:

1. Since, in the court's view, the "dominant purpose" of suspensions ordered by the Secretary in

four other cases had been "to punish the various [registrants] for their intentional and flagrant conduct," suspension of respondent would not "'achieve * * * uniformity of sanctions for similar violations * * * [and therefore would be] unwarranted and without justification in fact'" (Pet. App. A, 24–25).

2. In these circumstances "[t]he cease and desist order coupled with the damaging publicity surrounding these proceedings would certainly seem appropriate and reasonable with respect to the practice the Department seeks to eliminate" (Pet. App. A, 25).

SUMMARY OF ARGUMENT

In setting aside the Secretary's 20-day suspension of respondent's registration, the court of appeals exceeded the scope of proper judicial review of administrative sanctions. As this Court has noted, "where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence' * * *" (*American Power Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 112), and therefore judicial interference with statutorily permissible administrative remedial orders is unwarranted "'in the absence of a patent abuse of discretion'" (*Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244, 250). This consideration is particularly applicable to the review of administrative orders imposing sanctions for the violations of statutory requirements, for the determination of the sanc-

tion or sanctions necessary to deter future violations is a matter peculiarly within the expertise of the administrator. Thus other courts of appeals, in reviewing orders by the Secretary imposing sanctions for violations similar to those committed by respondent, have recognized that judicial review of such orders is limited to a determination of whether the Secretary made an allowable choice of remedy.

In this case, the 20-day suspension ordered by the Secretary was authorized by the Packers and Stockyards Act. Under the Act, market agencies, like respondent, are treated as "great national public utilities" (*Stafford* v. *Wallace*, 258 U.S. 495, 516) and are held to quasi-fiduciary standards in their dealings with buyers and sellers. Repeated underweighing of consigned cattle "with careless disregard of the statutory requirements" (Pet. App. A, 25) violates the statute and constitutes a breach of the public trust. Such violations must be deterred in order to achieve fully the statutory purpose of protecting producers, buyers, and the public from "unfair * * * practices in the meat industry" (*De Vries* v. *Sig Ellingson & Co.*, 100 F. Supp. 781, 786 (D. Minn.), affirmed, 199 F. 2d 677 (C.A. 8), certiorari denied, 344 U.S. 934). Congress recognized the need for such deterrence by granting the Secretary authority, upon finding that "any registrant * * * has violated [the Act, to] * * * issue an order suspending such registrant for a reasonable specified period." 7 U.S.C. 204. The brief 20-day suspension ordered by the Secretary here was reasonable, especially in light of respondent's repeated violations of the Act.

The grounds stated by the court of appeals did not justify setting aside the suspension. The court improperly attempted to insure that the sanctions imposed by the Secretary were uniform in all cases. But the Secretary is not required to apply the same sanction in every case. To the contrary, it is his responsibility to achieve compliance with the Act, and this may from time to time require changes in policy with respect to sanctions imposed on violators. And as this Court has noted, "'the [administrator] alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress * * *.'" *Federal Trade Commission* v. *Universal-Rundle Corp., supra,* 387 U.S. at 251. "Failing a gross abuse of discretion, the courts should not attempt to substitute their untutored views as to what sanctions will best accord with [administrative] regulatory powers * * *." *Tager* v. *Securities and Exchange Commission,* 344 F. 2d 5, 9 (C.A. 2).

Moreover, the distinction which the court of appeals drew between "wilful" and "intentional and flagrant" violations is misleading, for suspensions of registrants are designed to obtain compliance with the Act and not primarily to punish violators. But in any event, the court of appeals was in error in concluding that the Secretary had previously limited his imposition of suspensions to intentional and flagrant violations. It has long been the practice of the Secretary to impose suspension without a finding of a deliberate and flagrant violation.

The court of appeals improperly substituted its judgment for that of the Secretary in concluding that

because respondent had suffered unfavorable publicity a lesser sanction would be appropriate and reasonable. Such an independent determination of the nature and degree of the sanctions necessary for proper enforcement of the Act constituted a "forbidden judicial intrusion into the administrative domain." *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, 670.

ARGUMENT

THE COURT OF APPEALS EXCEEDED THE SCOPE OF PROPER JUDICIAL REVIEW OF ADMINISTRATIVE SANCTIONS IN SETTING ASIDE THE SECRETARY'S 20-DAY SUSPENSION OF RESPONDENT'S REGISTRATION

A. JUDICIAL REVIEW OF ADMINISTRATIVE ORDERS IMPOSING SANCTIONS IS LIMITED TO DETERMINING WHETHER THE AGENCY MADE AN ALLOWABLE CHOICE OF REMEDY

This Court has recognized and stressed that the judiciary exercises only a very limited power of review over orders fashioned by an administrative agency in implementation of its statutory responsibility. Thus, in *American Power Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, the Court, noting (at 112) that a narrow scope of review was mandated by the "fundamental principle * * * that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence' * * *," concluded (at 118):

> Our review is limited solely to testing the propriety of the remedy so chosen from the stand-

> point of the Constitution and the statute. We would be impinging upon the Commission's rightful discretion were we to consider the various alternatives in the hope of finding one that we consider more appropriate. * * *

The Court there affirmed a corporate dissolution ordered by the Securities and Exchange Commission, finding that the order was authorized by statute and was not "so lacking in reasonableness as to constitute an abuse of [the Commission's] discretion" (329 U.S. at 115).

Similarly, in *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414 and *Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244, 250, the Court noted that a reviewing court may not interfere with an administrative remedial order "in the absence of a patent abuse of discretion." And in *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 618–621, and *Barsky* v. *Board of Regents*, 347 U.S. 442, 455, the standard of review applied was whether the agency action was arbitrary, capricious, or an abuse of discretion.[3]

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[3] In dealing with corrective sanctions (*i.e.*, sanctions designed to correct currently illegal conditions) the Court has sometimes found it additionally necessary to utilize a "rational basis" test to determine whether the administrative order was reasonably related to the elimination of the illegal condition. See *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608. But this is a broader scope of review than is needed in cases involving the imposition of remedial sanctions designed only to insure future voluntary compliance, for in such cases the statutory prescription of a range of remedial sanctions (such as suspension) itself satisfies any requirement of a rational rela-

This principle is particularly appropriate in reviewing administrative orders imposing sanctions for violations of statutory and regulatory requirements. The determination of what sanction is necessary to deter future violations, by both the violator and others, must be based upon an informed judgment that can properly be made only by the expert body which is thoroughly familiar with conditions in the industry and the significance of the violations found. "[T]he due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution" (*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141) requires that the courts respect the agency's judgment concerning the sanction that is appropriate in the particular case.

With the exception of the court below in this case, the courts of appeals consistently have followed this principle in sustaining sanctions imposed by the Secretary of Agriculture. In *G. H. Miller & Co.* v. *United States*, 260 F. 2d 286, certiorari denied, 359 U.S. 907, the Seventh Circuit, in an *en banc* decision (overruling a decision by a panel) sustained the rev-

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tion between sanction and violation. Thus, in dealing with such remedial sanctions, the courts have applied a narrow scope of review, asking only whether the administrative order was authorized by statute and was neither arbitrary, capricious, nor an abuse of discretion. Cf. *In the Matter of Barsky* v. *Board of Regents*, 305 N.Y. 89, 111 N.E. 2d 222, affirmed, 347 U.S. 442. In any event, the Secretary's order here would satisfy any such "rational basis" test (see *infra*, pp. 14–16).

ocation by the Secretary of Agriculture of the registration of a "futures Commission merchant" under the Commodity Exchange Act. The court stated (260 F. 2d at 296):

> It is, therefore, clear to us that if the order of an administrative agency finding a violation of a statutory provision is valid and the penalty fixed for the violation is within the limits of the statute the agency has made *an allowable judgment in its choice of the remedy* and ordinarily the Court of Appeals has no right to change the penalty because the agency might have imposed a different penalty. [Emphasis in original.]

Similarly, in *Eastern Produce Co.* v. *Benson,* 278 F. 2d 606, the Third Circuit sustained an order of the Secretary of Agriculture suspending the licenses of registrants under the Perishable Agricultural Commodities Act, stating (at 610):

> The Judicial Officer considered all mitigating circumstances in arriving at his decision. Since his order is well within the allowable choice of remedy, we have no right to change the penalty because the agency might have imposed a different one.

And in *Hyatt* v. *United States,* 276 F. 2d 308, the Tenth Circuit, when confronted with a claim virtually identical to that made by respondent in the court below, concluded (at 313):

> The suspension of petitioners' registration [under the Packers and Stockyards Act] * * * was for twenty days. In view of their prior violations, the nature of the instant infractions,

and the other circumstances of the case, this penalty does not appear immoderate, and certainly it is one authorized by the act. It is not within our province on the record before us to interfere with the administrative determination.

B. THE SECRETARY DID NOT EXCEED HIS AUTHORITY IN SUSPENDING RESPONDENT'S REGISTRATION FOR 20 DAYS

1. The 20-day suspension was authorized by the Act

Under 7 U.S.C. 204, the Secretary has authority to suspend, "for a reasonable specified period," any registrant who has violated any provisions of the Act. The Secretary, after a hearing, the submission of briefs, and oral argument, determined that on February 25, 1969, respondent had violated the Act by underweighing livestock consigned to it for sale, and the court below properly upheld this determination as supported by substantial evidence. The Secretary acted within his statutory authority in suspending respondent's registration for 20 days.

Although the court of appeals acknowledged that the Secretary so acted, its opinion seems to suggest that the Secretary lacks authority to suspend merely negligent violators. It is by no means clear that respondent's violations were merely negligent.* But, in

*The hearing examiner found that respondent had intentionally underweighed livestock (see *supra*, p. 4), but the Judicial Officer merely determined "as did the hearing examiner, that respondent wilfully violated" the Act (Pet. App. B, 33). Thus the administrative findings pertaining to respondent's volitional state are ambiguous, for "wilfully" could refer to either intentional conduct or conduct which was merely in "careless disregard of the statutory requirements" (Pet. App. A, 25).

any event, the Secretary has ample authority to suspend registrants who commit violations in careless disregard of their statutory responsibilities.

Market agencies are treated by the Act as public utilities, as enterprises so directly affecting the public health and welfare as to warrant close public scrutiny and control. See *Denver Union Stock Yard Co.* v. *Producers Livestock Marketing Association*, 356 U.S. 282; *McCleneghan* v. *Union Stock Yards Co. of Omaha*, 298 F. 2d 659 (C.A. 8). For a market agency, like respondent, repeatedly and after several warnings to underweigh cattle consigned to it for sale (see *supra*, p. 3) constitutes a serious breach of the public trust, whether such action is intentional or merely negligent. The public is injured no less by the latter than by the former. Consequently, as the court below recognized (Pet. App. A, 23), violations may be committed by acting in careless disregard of the statutory requirements. See, *e.g.*, *Goodman* v. *Benson*, 286 F. 2d 896, 900 (C.A. 7).

Moreover, repeated negligent violations must be deterred to achieve fully the statutory "purpose of eliminating evils * * * in marketing livestock in the public stockyards of the nation * * * and to eliminate unfair * * * practices in the meat industry." *De Vries* v. *Sig Ellingson & Co.*, 100 F. Supp. 781, 786 (D. Minn.), affirmed, 199 F. 2d 677 (C.A. 8), certiorari denied, 344 U.S. 934. A cease-and-desist order, although inducing a greater degree of conscious compliance by the market agency to whom it is directed, may not secure future compliance by that market agency and has little effect in encouraging other market agencies to adhere to higher standards. But ne-

glectfulness by "great national public utilities" (*Stafford* v. *Wallace*, 258 U.S. 495, 516) toward their clear statutory responsibilities must be remedied. The Secretary has therefore determined, in this case as in others (see *infra*, pp. 20-21), that suspensions are necessary to deter repeated negligent violations of the Act. Congress recognized the need for such deterrence by granting the Secretary a broad suspension power, 7 U.S.C. 204, which makes no distinction between intentional and negligent violations of the Act.

Furthermore, as the court below observed, the issuance of the suspension in this case not only was authorized by the Act but fully complied with the Administrative Procedure Act, 5 U.S.C. 558, which authorizes suspension both in cases of "wilfulness" and where the registrant has received notice of prior violations and been given an opportunity to achieve compliance. Here respondent had been previously notified of three prior occasions of underweighing and had been accorded ample time to correct its performance. In light of this history of continuous violations, the issuance of a 20-day suspension, which will affect at most three business days, was a reasonable and proper exercise of the Secretary's discretion under the Act.

2. The grounds upon which the court of appeals set aside the suspension did not justify its action

a. The court improperly attempted to insure that the sanctions imposed by the Secretary were uniform in all cases

(1) Pointing to the fact that, in four other cases, the Secretary had ordered suspensions for the "domi-

nant purpose" of punishing registrants for violations characterized as "intentional and flagrant," the court below held that a suspension of respondent (whose violations, the court concluded, were "wilful" but not deliberate or flagrant) would not achieve uniformity of sanctions for similar violations. But the Secretary is not required to apply the same sanction in every case. A sanction that is within his authority is not invalid because it is allegedly more severe than those imposed in other cases. For example, the Secretary might determine that past leniency had hampered efforts to achieve full compliance with the Act and that as a consequence stricter measures were necessary to deter violations.

In *Federal Communications Commission* v. *WOKO*, 329 U.S. 223, in sustaining the Federal Communications Commission's refusal to renew a radio broadcasting license, this Court held (at 227–228):

> Respondent complains that the present case constitutes a departure from the course which the Commission has taken in dealing with misstatements and applications in other cases. * * * The mild measures to others and the appparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable.

In *Federal Trade Commission* v. *Universal-Rundle Corp., supra,* where a litigant sought to stay a cease-

and-desist order against certain unfair practices until similar orders were entered against competitors who allegedly had committed the same practices, the Court, emphasizing that "review must be limited to determining whether the Commission's evaluation of the merit of the petition for a stay was patently arbitrary and capricious" (387 U.S. at 250), upheld the denial of the stay on the ground that " 'the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress * * *' " (*id.* at 251).

The courts of appeals have also refused to compel uniformity of administrative sanctions. In *G. H. Miller* v. *United States, supra,* where the Secretary had revoked a license, the Seventh Circuit summarily rejected an argument based upon asserted non-uniform application of sanctions. The Second Circuit has also emphatically rejected the suggestion that it should oversee the uniformity of administrative sanctions (*Hiller* v. *Securities and Exchange Commission,* 429 F. 2d 856, 858–859):

> * * * Comparison of sanctions in other cases is foreclosed, however, by our decision in Dlugash v. Securities and Exchange Commission, 373 F. 2d 107 (2nd Cir. 1967). There petitioners complained that other parties in the same proceeding suffered disproportionately less severe penalties. We concluded that, even if the penalties were disproportionate, "it is irrelevant because the sanctions imposed upon the petitioners were well within the Commission's discretion." *A fortiori,* we cannot disturb the sanctions ordered in one case because they

were different from those imposed in an entirely different proceeding. "[F]ailing a gross abuse of discretion, the courts should not attempt to substitute their untutored views as to what sanctions will best accord with the regulatory powers of the Commission. * * *" Tager v. Securities and Exchange Comm'n, 344 F. 2d 5, 8–9 (2d Cir. 1965).

See also, *Kent* v. *Hardin*, 425 F. 2d 1346, 1349 (C.A. 5), rejecting as "unsound" the "argument that persons who have done much worse things received lighter penalties."

(2) Furthermore, the issue of uniformity of sanctions upon which the court below relied is an artificial one under the Act. Suspensions of registrants are designed to obtain compliance with the Act and not primarily to punish violators.[8] In this context, the

[8] Thus in *Eastern Produce Co.* v. *Benson*, *supra*, it was aptly observed that (278 F. 2d at 610):

"Petitioners' extended argument to the effect that this license suspension is purely punitive, not remedial, and thus cannot be justified is simply not persuasive. The order involves only a civil, administrative remedy. The issue was put to rest in Helvering v. Mitchell, 1938, 303 U.S. 391, * * * where Justice Brandeis indicated that 'Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted.' We concur with the expressed opinions of the First and Seventh Circuits that 'suspension of a registrant is not primarily punishment for a past offense but is a necessary power granted to the Secretary of Agriculture to assure a proper adherence to the provisions of the Act.' Nichols & Co. v. Secretary of Agriculture, 1 Cir., 1942, 131 F. 2d 651, 659 modified in another particular on rehearing 1 Cir., 1943, 136 F. 2d 503; Daniels v. United States, 7 Cir., 242 F. 2d 39, 42, certiorari denied 1957, 354 U.S. 939 * * *."

distinction the court drew between "wilful" and "intentional and flagrant" violations has little relation to the legitimate enforcement objectives of the Secretary. Proper enforcement requires that negligent as well as intentional violations be prevented.

(3) In any event, the Secretary has not limited his imposition of suspensions to intentional and flagrant violations.[6] There are many cases in which the Secretary has suspended registration for short-weighing producer's livestock even though the offense was not shown to have been deliberate or flagrant.[7] It has long been the practice of the Secretary to impose an appropriate suspension whenever there has been either notice and opportunity to comply with the law, or conduct that can properly be deemed "wilful" under 5 U.S.C. 558. Accordingly, respondent's suspension was consistent with the past administrative practice and did achieve substantial "uniformity of sanctions for similar violations" (Pet. App. A, 25).

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[6] In reaching the opposite conclusion, the court below relied primarily on *In re Milton Silver*, 21 A.D. 1438. But in that case the Secretary stated that "[f]alse and incorrect weighing of livestock by registrants under the act is a flagrant and serious violation thereof * * *" and that "even if respondent did not give instructions for the false weighings, his negligence in allowing the false weighings over an extended period brings such situation within the reach of the cited cases [sustaining sanctions] and we would still order the sanctions below" (21 A.D. at 1452). Thus, a "flagrant" violation in agency practice means no more than one which frustrates a key protection afforded by the Act.

[7] See, *e.g.*, *In re Art Martella*, 30 A.D. 1479; *In re Mary H. Meggs*, 30 A.D. 1314; *In re Producers Livestock Marketing Assn.*, 30 A.D. 796; *In re R. J. Trimble*, 29 A.D. 936; *In re Delbert Anson*, 28 A.D. 1127; *In re John A. Seymour*, 28 A.D. 1023; *In*

b. The court improperly substituted its judgment for that of the Secretary in concluding that a lesser sanction would be appropriate and reasonable

The court below also justified setting aside the suspension on the ground that the "cease and desist order coupled with the damaging publicity surrounding these proceedings would certainly seem appropriate and reasonable with respect to the practice the Department seeks to eliminate" (Pet. App. A, 25). But, as already shown (see *supra*, pp. 10–14), the fashioning of an "appropriate and reasonable" remedy is the function of the Secretary, not of the court. The court's role is only to determine whether the sanction the Secretary selected is within his authority. The independent determination by the court of the nature and degree of the sanctions necessary for proper enforcement of the Act constituted a "forbidden judicial

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re Carl Register, 28 A.D. 1021; *In re Tony G. Brasil*, 28 A.D. 869; *In re Williamstown Stockyards, Inc.*, 27 A.D. 252; *In re Gerry Kaus*, 26 A.D. 1265; *In re Tom Murray*, 26 A.D. 726; *In re Clark Tilghman, et al.*, 26 A.D. 62; *In re Smith Waller*, 25 A.D. 46; *In re Gordon Barber, et al.*, 24 A.D. 283; *In re Lemuel J. Wilson, et al.*, 23 A.D. 1492; *In re Middle Georgia Livestock Sales Co.*, 23 A.D. 1361; *In re Lyon B. Hutcherson, Jr.*, 23 A.D. 1349; *In re J. W. Edwards*, 23 A.D. 794. These cases all involve suspensions under the Packers and Stockyards Act because the registrant falsely weighed producer's livestock, and in none did the Secretary find that the offender acted deliberately or flagrantly. There are, additionally, numerous cases under the Act where registrations were suspended because of diverse other violations without a holding that the conduct was intentional or flagrant. See, *e.g.*, *In re Dub Wallis*, 29 A.D. 37. Moreover, there are numerous instances of suspensions, not predicated on a conclusion that the violations were deliberate or flagrant, under other remedial statutes administered by the Department.

intrusion into the administrative domain." *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, 670.

In any event, there was no showing that the publicity here was other than the routine publicity which attends all cases of this kind.[4] Such publicity, which furthers the public's interest in being informed of administrative action taken on its behalf, is not a substitute for the sanction that is necessary to effective implementation of the statute. Cf. *Bowman* v. *United States Dept. of Agriculture*, 363 F. 2d 81, 86 (C.A. 5); *Federal Trade Commission* v. *Cinderella Career and Finishing Schools, Inc.*, 404 F. 2d 1308 (C.A.D.C.).

C. PERMITTING JUDICIAL MODIFICATION OF THE ADMINISTRATIVE SANCTION WOULD MAKE IT MORE DIFFICULT TO OBTAIN COMPLIANCE WITH THE ACT

The practical effect of the action of the court of appeals will be to make it more difficult for the Secretary to obtain compliance with the Act. The effectiveness of the threat of sanctions such as suspension as a deterrent to violations of the Act is bound to be weakened if registrants know that such sanctions are subject to judicial modification or elimination if they can persuade the court that their illegal conduct was not as serious as the Secretary concluded.

The consequence is especially significant when the violation involved is false weighing—respondent's violation—because such activity has resulted in substantial losses to producers and the Packers and Stock-

[4] The court was apparently referring principally to the Secretary's press releases issued in connection with this matter. See Br. in Opp. App. D and F.

yards Administration has been able to carry out only a small number of selective weighing investigations each year.[9] In view of these enforcement problems, the ability of the Secretary to impose meaningful sanctions must be maintained.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals setting aside respondent's suspension should be reversed and the 20-day suspension ordered by the Secretary should be reinstated.

Respectfully submitted.

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[9] The necessity for an effective deterrent against this type of violation is shown by a report of the Department of Agriculture to Congress in 1969 which indicated that false weighing alone results in losses to livestock producers of approximately $15 million annually. Congress was further told that false weighing had been found at 19.4 percent of the markets and buying stations investigated in 1968, including 14.4 percent of the facilities examined on a "routine, spot check basis without any reason to suspect false weighing." Hearings before a Subcommittee of the House Committee on Appropriations, "Department of Agriculture Appropriations For 1970," Part 3, 91st Cong., 1st Sess., p. 19.

APPENDIX

The Packers and Stockyards Act of 1921, as amended, 7 U.S.C. 181 *et seq.*, provides in pertinent part:

7 U.S.C. 204:

> On and after July 12, 1943, the Secretary may require reasonable bonds from every market agency and dealer, under such rules and regulations as he may prescribe, to secure the performance of their obligations, and whenever, after due notice and hearing, the Secretary finds any registrant is insolvent or has violated any provisions of this chapter he may issue an order suspending such registrant for a reasonable specified period. Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the Secretary or a court of competent jurisdiction.

7 U.S.C. 208(a):

> It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

7 U.S.C. 213(a):

> It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determin-

ing whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock.

7 U.S.C. 221:

> Every packer or any live poultry dealer or handler, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than $5,000, or imprisoned not more than three years, or both.

The provisions of the Judicial Code governing judicial review of this case in the court of appeals, 28 U.S.C. 2341 *et seq.*, provide in pertinent part:

28 U.S.C. 2342:

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

* * * * *

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

* * * * *

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. 2349(a):

The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

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